

No. 11886

United States
Circuit Court of Appeals
For the Ninth Circuit

CALVERT F. WILEY,

Appellant,

vs.

UNITED STATES OF AMERICA, OLIVER J.
OLSON & CO., a Corporation, and UNITED
STATES LINES CO., a Corporation,
Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
APR 24 1940

PAUL P. O'BRIEN,
CLERK

No. 11886

United States
Circuit Court of Appeals

For the Ninth Circuit

CALVERT F. WILEY,

Appellant,

vs.

UNITED STATES OF AMERICA, OLIVER J.
OLSON & CO., a Corporation, and UNITED
STATES LINES CO., a Corporation,
Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Service by Mail.....	9
Assignments of Error.....	16
Certificate of Clerk to Transcript of Record on Appeal	18
Citation on Appeal.....	19
Libel in Personam.....	2
Libelant's Designation of Apostles on Appeal and Praeipie Therefor.....	17
Libelant's Petition for Appeal and Order Al- lowing Appeal.....	15
Order Allowing Appeal.....	16
Motion to Dismiss.....	12
Notice of Motion.....	13
Names and Addresses of Proctors.....	1
Order Dismissing Libel.....	14
Order Extending Time to Docket.....	18
Seaman's Act.....	10
Statement of Points on Which Libelant and Appellant Intends to Rely on Appeal and Designation of Record on Appeal.....	21

NAMES AND ADDRESSES OF PROCTORS

GLADSTEIN, ANDERSON, RESNER &
SAWYER,

HERBERT RESNER,
240 Montgomery Street,
San Francisco, California.

Proctors for Libelant and Petitioner.

FRANK J. HENNESSY,
United States Attorney.

C. ELMER COLLETT,
Assistant United States Attorney.
Post Office Building,
San Francisco, California

Proctors for Respondents and
Appellee.

Trial Before the Honorable Michael J. Roche,
District Judge, Sitting Without a Jury

In the United States District Court, for the Northern District of California, Southern Division—
in Admiralty

No. 24925-R

CALVERT F. WILEY,

Libelant,

vs.

UNITED STATES OF AMERICA; OLIVER J. OLSON & CO., a Corporation; UNITED STATES LINES CO., a Corporation; THE DOE COMPANY, JOHN DOE, and RICHARD ROE,

Respondents.

LIBEL IN PERSONAM

(For damages for personal injury, under the Suits in Admiralty Act and the Public Vessels Act)

To the Honorable the Judges of the Above-Entitled Court:

The libel of Calvert F. Wiley against the United States of America, Oliver J. Olson & Co., a corporation, and United States Lines Co., a corporation, against the SS E. A. Bryan, owned by the [1*] United States of America and managed, navigated, maintained and operated by Oliver J. Olson & Co., a corporation, against the SS Quinault Victory, owned by the United States of America and managed, navigated, maintained and operated by United States Lines Co., a corporation, and against all

* Page numbering appearing at top of page of original certified Transcript.

persons lawfully intervening for their interests, in a cause of action for damages under the Suits in Admiralty Act and the Public Vessels Act, civil and maritime, alleges:

I.

That the United States vessel, SS E. A. Bryan, is a vessel of United States registry and now is, and during all the times herein mentioned was, owned by the United States of America and was managed, maintained, operated, and navigated by the said Oliver J. Olson & Co., a corporation, as general agent for and on behalf of respondent, United States of America.

That the United States vessel, SS Quinault Victory, is a vessel of United States registry and now is, and during all the times herein mentioned was, owned by the United States of America and was managed, maintained, operated, and navigated by the said United States Lines Co., a corporation, as general agent for and on behalf of respondent United States of America.

II.

That the respondents United States of America, Oliver J. Olson & Co., a corporation, and United States Lines Co., a corporation, respectively, maintain offices and principal places of business, in connection with the matters of which complaint is made in the within libel, in the City and County of San Francisco, [2] State of California, and said respondents are within the jurisdiction of the above-entitled Court.

III.

That the respondents The Doe Company, John Doe, and Richard Roe are sued herein under fictitious names; that libelant does not know the true names thereof and, therefore, prays leave to insert said true names when ascertained.

IV.

That libelant brings and maintains this action pursuant to the provisions of 46 USCA, §§741 to 752, commonly known as the Suits in Admiralty Act; also pursuant to the provisions of 46 USCA, §§ 781 to 790, commonly known as the Public Vessels Act.

V.

That libelant is, and during all of the times herein mentioned was a resident of Port Chicago, California, and resides within the jurisdiction of the above-entitled Court.

VI.

That on July 17, 1944, libelant was in the employ of respondent United States of America, to wit, United States Navy, in the capacity of carpenter at Port Chicago, California, at wages totaling \$75 per week.

VII.

That on said date of July 17, 1944, respondents owned, operated, managed and controlled said vessels, SS E. A. Bryan and SS Quinault Victory, which vessels were docked at said Port Chicago, California. That said vessels were then and there under the exclusive care, operation, management, and control of the said [3] respondent. That the

respondent United States of America did then and there own, operate, manage and control a certain pier, wharf, dock and loading platform to which said vessels were anchored or tied up.

That respondents were then and there engaged in loading, or otherwise handling, cargoes of ammunition aboard and in the vicinity of said vessels and along and upon said docks, wharf, pier and loading platform. That the respondents did then and there so negligently and carelessly handle, load, keep, maintain and use said cargoes of ammunition, said vessels, and said dock, wharf, pier and loading platform that said ammunition was caused to and it did violently and forcibly explode, and as a direct and proximate result thereof libelant, who was working on said dock, wharf, pier and loading platform, was caused to and he did suffer and incur severe and grievous personal injuries, as follows: libelant's left arm was crushed; libelant suffered ammunition wounds and cuts, scars, abrasions and injury to his face, back, right leg, neck, and other parts of libelant's body. That libelant's injuries are of a continuing nature and have continued and persisted from the date of injury to the date hereof. That libelant has been forced to and he has received two operations to said injured left arm, and that said injuries have caused libelant severe and grievous mental and physical pain and suffering, and libelant is informed and believes and alleges that said injury to his left arm will be permanent in character. That all of said injuries have caused libelant general damages in the amount of \$75,000.

VIII.

That libelant was gainfully employed and earning at least \$75 per week as wages at the time of said accident and explosion. That as a direct and proximate result of said explosion and the negligence and carelessness of respondents as herein alleged and the injuries suffered by libelant, libelant has lost approximately ten months employment, all to his general damage on account of wage loss in the amount of \$3,225.

That libelant is informed and believes and alleges that he will suffer further loss of wages on account of said injuries, and prays leave to amend his libel and insert herein, or offer proof at the time of trial, the amount of such further loss of wages when the same has been ascertained:

IX.

That from the date of his injury, to wit, July 17, 1944, and extending for a considerable period of time thereafter, libelant was under the care of doctors and was obtaining hospitalization. That said medical attention and treatment has continued until the time hereof and still continues. That from July 17, 1944, until the time hereof libelant has attempted to learn from respondents what redress or remedy he had by virtue of the injuries inflicted upon libelant by respondents. That respondents informed and advised libelant that the only redress or remedy he had was by compensation under the United States Employee's Compensation Law. That libelant did not learn until within six weeks prior

to the filing of this libel that he had a remedy or relief by virtue of the statutes pursuant to which this action is brought. [5] That libelant's rights in this regard were not finally determined under any circumstances until the decision by the United Employees' Compensation Law. That libelant did not learn until within six weeks prior to the filing of this libel that he had a remedy or relief by virtue of the statutes pursuant to which this action is brought. That libelant's rights in this regard were not finally determined under any circumstances until the decision by the United States Supreme Court in the case of *Porello v. United States*, No 69, October Term 1946, decided March 10, 1947. That if there is a two-year period of limitation under the Suits in Admiralty Act and the Public Vessels Act, said period of limitations has been tolled by virtue of the facts and circumstances set forth herein.

X.

That all and singularly the allegations hereof are true and are within the admiralty and maritime jurisdiction of the above-entitled Court.

Wherefore, libelant prays that process in due form of law according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction may issue against said respondents, and each of them, and that citation in personam may issue against said respondents, and each of them, and that they be cited and required to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court

may be pleased to decree the payment to libelant by respondents, and each of them, of the sum of \$75,000 general damages, plus wages in the amount of \$3,225, plus future wage loss when [6] ascertained, for costs of suit incurred herein, and for such other and further relief as is meet and just in the premises.

Dated: April 16, 1947.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,
Proctors for Libelant.

State of California,
City and County of San Francisco—ss.

Herbert Resner, being first duly sworn, deposes and says:

That he is proctor for libelant in the within and foregoing libel and makes this verification for and on behalf of libelant for the reason that said libelant is presently out of the county in which affiant has his office; that affiant has read said libel and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information or belief, and as to those matters he believes it to be true.

HERBERT RESNER.

Subscribed and sworn to before me this 16th day of April, 1947.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed April 18, 1947. [7]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

City and County of San Francisco—ss.

Herbert Resner, being sworn, says that he is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco, and proctor for libelant in the within action. That affiant's business address is 240 Montgomery Street, San Francisco, California. That affiant served copies of the Seaman's Libel in Personam on file herein by placing said copies in envelopes addressed to:

United States Attorney General, Washington, D. C., and Frank J. Hennessy, Esq., United States Attorney, Post Office Building, San Francisco, California

which envelopes were then sealed and postage fully prepaid thereon, and thereafter were on April 21, 1947, forwarded by registered mail from San Francisco, California.

That there is delivery service by United States mail at the places so addressed, or regular communication by United States mail between the place of mailing and the places so addressed. [8]

HERBERT RESNER.

Subscribed and sworn to before me this 21st day of April, 1947.

[Seal]

ALICE C. MORSE,

Notary Public in and for the City and County of San Francisco, State of California

[Endorsed]: Filed April 23, 1947. [9]

District Court of the United States, Northern District of California, Southern Division.

No. 24925-R

SEAMAN'S ACT

The President of the United States of America to the Marshal of the United States for the Northern District of California—Greetings:

Whereas, a Libel has been filed in the District Court of the United States for the Northern District of California, Southern Division, on the 18th day of April, 1947.

By Calvert F. Wiley, libelant, v. United States of America; Oliver J. Olson & Co., a corporation; United States Lines Co., a corporation; The Doe Company, John Doe and Richard Roe, respondents, in a certain action for damages, civil and maritime, to recover the sum of \$78,225 (as in said Libel will more fully and at large appear) therein alleged to be due the said libelant Calvert F. Wiley and praying that a citation may issue against the said respondent pursuant to the rules and practice of this Court;

Now, Therefore, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondents, if they shall be found in your District, that they be and appear before the said District Court on the 29th day of April, 1947, at 10 o'clock a.m. at the Court Room in the City and County of San Francisco, then and there to answer the said Libel and

to make their allegations in that behalf, and have you then and there [10] this writ with your return thereon.

Witness the Honorable Michael J. Roche, Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 18th day of April, 1947.

[Seal]

C. W. CALBREATH,
Clerk,

By C. A. TROLLIET,
Deputy Clerk.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
Proctor for Libelant.

MARSHAL'S RETURN

I have served this writ personally by copy on Oliver J. Olson & Company by serving Oliver J. Olson, Jr., as President at San Francisco, California, and on United States Lines Co. by serving B. H. Parkinson as Agent at San Francisco, California, this 21st day of April, A. D. 1947.

GEORGE VICE,
U. S. Marshal.

HERBERT R. COLE,
Deputy Marshal.

Marshal's Fees: Travel, Service, \$4.00.

[Endorsed]: Filed April 29, 1947. [11]

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the respondents United States of America, Oliver J. Olson & Co., a corporation, and United States Lines Co., a corporation, and move the Court to dismiss this suit on the following grounds:

I.

That as to respondent United States of America, it appears from the libel that the alleged injury for which damages are claimed arose not later than July 17, 1944, and that the libel herein was filed April 18, 1947. By reason of the premises it appears from the face of the libel that suit was not brought within two years from the accrual of the cause of action, as required by Section 5 of the Suits in Admiralty Act, 1920, 46 U.S.C. 745.

II.

That the libel on file does not state a cause of action within the admiralty jurisdiction of this Court.

III.

That as to respondent United States of America, said libel does not state facts sufficient to constitute a cause of action against said respondent for which said respondent has consented to be sued.

IV.

As to respondents Oliver J. Olson Co., and United States Lines Co., said libel does not allege facts sufficient to constitute a [12] cause of action against said respondents.

V.

That the United States Employees' Compensation Act, 5 U.S.C. 751, provides the exclusive remedy for libelant's injury.

Wherefore, respondents pray that said libel be dismissed with prejudice.

/s/ FRANK J. HENNESSY,
United States Attorney.
WILLIAM E. LICKING,
/s/ C. ELMER COLLETT,
Assistant United States
Attorney,
Proctors for Respondents.

NOTICE OF MOTION

To: Libelant Above-Named, and to Messrs. Gladstein, Andersen, Resner, Sawyer & Edises, 240 Montgomery Street, San Francisco 4, California, His Attorneys:

Please Take Notice That the undersigned will bring the attached Motion to Dismiss on for hearing before this Court at Room No. 338, Post Office and Court House Building, City and County of San Francisco, California, on the 8th day of September, 1947, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ FRANK J. HENNESSY,
United States Attorney.
WM. E. LICKING,
Ass't. U. S. Attorney.
C. ELMER COLLETT,
Assistant United States
Attorney,
Attorneys for Respondents.

[Endorsed]: Filed Aug. 21, 1947. [14]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 24,925-R

In Admiralty

CALVERT F. WILEY,

Libelant,

vs.

UNITED STATES OF AMERICA; OLIVER J.
OLSON & CO., a Corporation; UNITED
STATES LINES CO., a Corporation; THE
DOE COMPANY, JOHN DOE and RICH-
ARD ROE,

Respondents.

ORDER DISMISSING LIBEL

Libelant seeks to recover damages for injuries alleged to have been sustained by him while working on a loading dock as a carpenter, in which capacity he was employed by the United States Navy. Injuries so sustained are non-maritime and do not fall within the admiralty jurisdiction of this court. See *U. S. v. Marine*, 155 F. 2d 456, *The Admiral Peoples*, 295 U. S. 649. It is, therefore, by the Court.

Ordered that the motion of respondents to dismiss the within action be and the same hereby is Granted and said Libel shall be and the same hereby is Dismissed.

Dated: December 30th, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Dec. 30, 1947. [15]

[Title of District Court and Cause.]

LIBELANT'S PETITION FOR APPEAL AND
ORDER ALLOWING APPEAL

Comes now the libelant herein, Calvert F. Wiley, and being aggrieved by the Order Dismissing Libel, judgment and decree made and entered herein on December 30, 1947, by the above-entitled United States District Court, does hereby claim an appeal from said Order, judgment and decree to the United States Circuit Court of Appeal for the Ninth Circuit, and prays that his said appeal may be allowed.

The points and grounds of appeal are the following:

(1) The Order Dismissing Libel and the decree and judgment of the Court dismissing the above-entitled action upon the ground that the Court lacked jurisdiction are contrary to law and are in error.

(2) The Court erred in failing to consider and determine the above-entitled cause on its merits.

Dated: February 2, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,

Proctors for Libelant and
Appellant. [16]

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

Done in Open Court This 3rd Day of February,
1948.

LOUIS E. GOODMAN,

Judge of the United States
District Court.

[Endorsed]: Filed Feb. 6, 1948. [17]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the libelant herein, Calvert F. Wiley, and hereby assigns as error in the proceedings, orders, decision, judgment and decree of the above-named District Court in the above-entitled action the following:

- 1) That the District Court erred in law in dismissing for lack of jurisdiction the libel of libelant herein and in ordering a decree and judgment for respondents.
- 2) That the Order Dismissing Libel for want of jurisdiction made and entered herein on December 30, 1947, is contrary to law.
- 3) The District Court should have considered this case on its merits and erred as a matter of law in failing so to do.

Dated: February 2, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,

Proctors for Libelant and
Appellant.

[Endorsed]: Filed Feb. 6, 1948. [18]

[Title of District Court and Cause.]

LIBELANT'S DESIGNATION OF APOSTLES
ON APPEAL AND PRAECIPE THEREFOR

To Frank J. Hennessy, United States Attorney,
Post Office Building, 7th and Mission Streets,
San Francisco, California, Proctor for Re-
spondent; Messrs. Brobeck, Phleger & Harrison,
111 Sutter Street, San Francisco, California,
Proctors for Respondent; Carl W. Calbreath,
Clerk of the United States District Court for
the Northern District of California, Southern
Division:

Libelant hereby designates and requests that the
record on appeal in the above-entitled action shall
include:

1. Libel in Personam.
2. Citation in Personam.
3. Affidavit of service by mail.
4. Motion to dismiss, by respondents.
5. Order Dismissing Libel of December 30, 1947.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignments of Error, proposed by libelant.
9. Libelant's Designation of Apostles on Appeal
and Praecipe therefor. [19]

Dated: February 2, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,

Proctors for Libelant and
Appellant.

[Endorsed]: Filed Feb. 6, 1948. [20]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including April 13, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: March 4, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Mar. 4, 1948. [21]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 21 pages, numbered from 1 to 21, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Calvert F. Wiley, Libellant, vs. United States of America, et al., Respondents, No. 24925-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of \$6.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 24th day of March, A.D. 1948.

[Seal]

C. W. CALBREATH,

Clerk.

/s/ M. E. VAN BUREN,

Deputy Clerk. [22]

In the United States District Court for the
Northern District of California, Southern
Division

No. 24925-R

In Admiralty

CALVERT F. WILEY,

Libelant,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

CITATION ON APPEAL

To Respondents Above Named and to Frank J. Hennessy, Esq., and Messrs. Brobeck, Phleger & Harrison, Their Proctors:

Whereas, the libelant herein, Calvert F. Wiley, has lately appealed to the United States Circuit

Court of Appeals for the Ninth Circuit from the entry of the decree in favor of the respondent, United States of America and against libelant, which decree was entered in the District Court of the United States of America for the Northern District of California, Southern Division, on the 30th day of December, 1947,

You Are, Therefore, Hereby Cited to Appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, at the next term of said Court, thirty days after the date of this citation, to do and receive what may appertain to justice to be done in the premises. [23]

Given Under My Hand in the City and County of San Francisco, State of California, in the Ninth Circuit, on the 3rd day of February, 1948.

/s/ LOUIS E. GOODMAN,

Judge of the United States
District Court.

[Endorsed]: Filed Feb. 6, 1948. [24]

[Endorsed]: No. 11886. United States Circuit Court of Appeals for the Ninth Circuit. Calvert F. Wiley, Appellant, vs. United States of America, Oliver J. Olson & Co., a Corporation, and United States Lines Co., a Corporation, Appellees. Apostles on Appeal. Upon Appeal From the District Court of the United States for the Northern District of California, Southern Division.

Filed March 24, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11886

CALVERT F. WILEY,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

STATEMENT OF POINTS ON WHICH LIBEL-
ANT AND APPELLANT INTENDS TO
RELY ON APPEAL AND DESIGNATION
OF RECORD ON APPEAL

Comes now the libelant and appellant herein and designates the following points on which he intends to rely on appeal:

1) That the District Court erred in law in dismissing for lack of jurisdiction the libel of libelant herein and in ordering a decree and judgment for respondents.

2) That the Order Dismissing Libel for want of jurisdiction made and entered herein on December 30, 1947, is contrary to law.

3) The District Court should have considered this case on its merits and erred as a matter of law in failing so to do.

Libelant and appellant designates the entire record as certified to the above-entitled Court as the record on appeal herein.

Dated: April 2, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,
Proctors for Libelant and
Appellant.

Receipt of a copy of the within document is hereby acknowledged the 5th day of April, 1948.

FRANK J. HENNESSY,
Attorney for Appellee.

[Endorsed]: Filed April 5, 1948.